UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, RONALD BIENDSEIL, RON BOONE, VERA BOONE, ELVIRA BUMPUS, EVANJELINA CLEEREMAN, SHEILA COCHRAN, LESLIE W. DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD KRESBACH, RICHARD LANGE, GLADYS MANZANET, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, GLORIA ROGERS, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE and RONALD KIND,

Intervenor-Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants.

Civil Action
File No. 11-CV-562

Three-judge panel
28 U.S.C. § 2284

(caption continued on next page)

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO ALTER OR AMEND THE ORIGINAL JUDGMENT ON COSTS AND MOTION FOR ATTORNEY'S FEES AND COSTS 42 U.S.C. §§ 1973*l*(e), 1988

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA WARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Case No. 11-CV-1011
JPS-DPW-RMD

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

On March 22, 2012, the Court held that state legislative district boundaries violated federal law, enjoining the implementation of Act 43. When the legislature, for the third time, declined the Court's explicit invitation to try to remedy the violation, the Court adopted plaintiffs' proposal for two new assembly districts in Milwaukee. Meanwhile, plaintiffs moved for their costs and fees and, in the name of defendants, the Wisconsin Department of Justice appealed to the U.S. Supreme Court.[1]

The Department of Justice's responsive brief, without a motion or a supporting citation, asks the Court to stay any decision on costs and fees until its appeal is resolved. Not only is there no justification or need for a stay, but any decision on costs and fees is appealable to the

[1] The Attorney General pronounced the state "vindicated" the day after the panel's decision. Nonetheless, the Attorney General authorized the appeal, asserting that "it is not the appropriate role of the judiciary in this case to tell the Legislature that they had to redraw the lines even in two districts," and consequently, that "the judiciary overstepped their bounds." *See* Patrick Marley, *Van Hollen Says Cost of Appealing Redistricting Case Will Be Minimal*, MILWAUKEE J. SENTINEL, April 20, 2012, http://www.jsonline.com/blogs/news/148302795.html#!page=2&pageSize=10&sort=newestfirst.

U.S. Court of Appeals regardless of the Supreme Court outcome. *See Hastert v. Illinois State Bd. of Election Comm'rs*, 28 F.3d 1430, 1436-47 (7th Cir. 1993); *see also* Eugene Gressman, et al., *Supreme Court Practice* 111 n.72 (9th ed. 2007). Therefore, any such decision is jurisdictionally and practically separate from the Department's appeal. Indeed, the responsive brief raises few contested issues under 42 U.S.C. §§ 1973*l* and 1988 for this Court to resolve, save the amount of any award and, even then, only with respect to the Baldus plaintiffs.

The Department of Justice characterizes plaintiffs' successful prosecution of their Section 2 Voting Rights Act claim as securing merely the movement of "one boundary line." It is disappointing (but not surprising) that the Department—the state's chief law enforcement agency—dismisses so lightly the legislature's violation of the voting rights of tens of thousands of Latino citizens in Milwaukee, rights which this Court has recognized are "fundamental." *See* Defendants' Response in Opposition to Plaintiffs' Motion to Alter or Amend the Original Judgment on Costs, and Opposition to Motion for Attorney's Fees and Costs ("Opp'n") (Dkt. 243) at 7-8; Mem. Op. (Dkt. 210) at 19. The nonpartisan Government Accountability Board, which the Department nominally represents, is charged with ensuring the integrity of the electoral process, a mission advanced by plaintiffs' successful challenge to Act 43 and the remedy approved by this Court. Yet nowhere in its papers does the Department ever acknowledge the importance of the fundamental rights at stake—and vindicated—in this lawsuit.

Despite that, the Department's opposition offers little support for its position:

- The Department of Justice concedes that Baldus plaintiffs, at the least, are "partially prevailing parties," Opp'n at 7.
- The Department of Justice necessarily must concede that the Voces plaintiffs are prevailing parties, having obtained judgment on the sole claim that they brought. Indeed, the Department of Justice has not challenged the reasonableness of the hourly rates of the attorneys for the Voces plaintiffs.

- The Department of Justice has not challenged the detailed billing statement submitted by the Voces plaintiffs.

- The Department of Justice presents no "special circumstances" that would render any award to plaintiffs unjust.

- The Department of Justice has joined plaintiffs in requesting that the Court set a briefing schedule on the reasonableness of the Baldus plaintiffs' costs and fees.

Given its failure to challenge the statutory obligation to pay at least part of plaintiffs' fees, the Department's position that prevailing plaintiffs pay some fees incurred by *the state* is even more remarkable than it otherwise would be. Like much of what has transpired in this litigation, that argument is unprecedented—and unfounded.

DISCUSSION

I. THE COURT HAS JURISDICTION TO DECIDE, WITHOUT DELAY, THE CLAIMS FOR FEES AND COSTS UNDER THE CIVIL RIGHTS ACT.

The Court's adoption of plaintiffs' proposed Assembly Districts 8 and 9 restores the fundamental rights of Latino citizens in Wisconsin. Plaintiffs are prevailing parties—both on the merits of their Voting Rights Act claim and the remedy for the legislature's violation. All that remains for the panel's determination is the cost to the plaintiffs to vindicate their fundamental rights under the Civil Rights Act, the payment of which is within the Court's command and should not be delayed.

Whatever the substance of the Department's notice of appeal, it does not affect plaintiffs' joint motion to alter or amend the judgment as to attorney's fees. It is well-settled that the pendency of an appeal does not rob the Court of the authority to "wrap up unfinished business," so long as the district court's activities do not affect "aspects of the case involved in the appeal." *Albiero v. City of Kankakee*, 122 F.3d 417, 418 (7th Cir. 1997).

An award of attorney's fees in an appropriate amount to the prevailing plaintiffs is one such category of "unfinished business" that can be addressed by the Court during the pendency

of the appeal. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988); *WMS Gaming, Inc. v. WPC Prods. Ltd.*, 542 F.3d 601, 605 (7th Cir. 2008); *see also Homans v. City of Albuquerque*, 264 F. Supp. 2d 972, 978 (D.N.M. 2003) (prevailing party on a constitutional challenge to a campaign finance provision entitled to recover reasonable attorney's fees and expenses despite a pending appeal on the merits). By contrast, the Department offers no compelling reasons, legal or otherwise, for its request that resolution of plaintiffs' motion be stayed pending the Department's appeal.

By granting the plaintiffs' motion without delay, the Court moves closer to concluding the unfinished business of this litigation. Not incidentally, it furthers the public policy rationale underlying the attorney's fees provisions in 42 U.S.C. §§ 1973*l*(e) and 1988—to encourage individuals whose fundamental rights are compromised to seek redress. *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (stating the purpose of the Civil Rights Attorney's Fees Awards Act is to ensure "effective access to the judicial process" for persons with civil rights grievances) (internal citation omitted).

II. THE VOTING RIGHTS ACT, IN LIGHT OF THE DEPARTMENT OF JUSTICE'S CONCESSIONS, REQUIRES AN AWARD OF COSTS AND FEES IN SOME AMOUNT.

All of the plaintiffs prevailed on their Voting Rights Act claims to redress the legislature's unlawful treatment of Latino neighborhoods in Milwaukee. The Department of Justice fought this claim at every stage of the litigation: pleadings (through an unsuccessful motion to dismiss); discovery; dispositive motions (through an unsuccessful motion for summary judgment); trial on the merits; and remedies. While the Baldus plaintiffs did not prevail on their other claims, that is not the standard for an award of costs and fees. *See* Pls.' Br. (Dkt. 229) at 6-9. Plaintiffs need only have "succeeded on any significant claim affording [them] some of the relief sought" to prevail. *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489

U.S. 782, 791 (1989). They did. And the Department, though dismissive of the import of the judgment in plaintiffs' favor, concedes that the Baldus plaintiffs are—at the very least—"partially prevailing parties." Opp'n at 7. Moreover, though its brief did not say so explicitly, the Department also must acknowledge that the Voces plaintiffs prevailed—period, with no caveats—on their one and only claim.

In conceding these points, the Department necessarily concedes entitlement to some legal fees for all of the plaintiffs. The degree of success achieved by prevailing plaintiffs is relevant only to the calculation of a fee that is reasonable. *See Texas State Teachers Ass'n*, 489 U.S. at 790. And an award may be denied only if "special circumstances would render such an award unjust." *Hastert*, 28 F.3d at 1439 n.10. In their opening brief, plaintiffs anticipated addressing in this reply any "special circumstances" asserted by the Department of Justice, challenging the Department to identify in its opposition brief the "special circumstances" necessary to defeat plaintiffs' motion. *See* Pls.' Br. at 8-9. In the end, however, a reply is unnecessary on this point; the Department's brief fails to identify a single "special circumstance." Indeed, the Department's brief fails to address this standard at all.

The Department relies instead on a single case holding that, when a civil rights plaintiff "who seeks compensatory damages . . . receives no more than nominal damages," then "the only reasonable fee is usually no fee at all." *Farrar v. Hobby*, 506 U.S. 103, 115 (1992). That holding has no applicability to plaintiffs' successful pursuit of declaratory and injunctive (not monetary) relief, which resulted in the Court's entry of an injunction that bars Act 43 from being implemented and vindicated the plaintiffs' "fundamental rights." Plaintiffs did not merely achieve a "small fraction of what" they sought. Opp'n at 6. Rather, this Court enjoined the implementation of Act 43 in its entirety as proposed, passed, and signed by the Governor,

adopting in its place an order for the entire state and the reconfiguration of assembly districts affecting 115,000 residents of Milwaukee.

The Department also opposes plaintiffs' motion by insisting that the Court has "already ruled on" the issue of attorney's fees before plaintiffs even filed their fee motion. Opp'n at 3. But nothing in that argument rebuts the statutory presumption in favor of awarding prevailing civil rights plaintiffs their fees. The Court is not constrained by a statement it made as to costs alone that preceded the filing of a motion for fees and without the benefit of any briefs by the parties or any explanation by the Court. As plaintiffs already have argued, Pls.' Br. at 12-13, that single phrase on the judgment can and should be amended to reflect the prevailing plaintiffs' fee application. A statement by the Court as to ordinary statutory costs cannot predetermine a virtually mandatory award (given the Department's concession) under the Civil Rights Act.

The Voces plaintiffs have submitted a detailed billing statement to which defendants have raised no objection. The Baldus plaintiffs requested, as permitted by Rule 54(d)(2)(C), that the Court "decide issues of liability for fees before receiving submissions on the value of services." Pls.' Br. at 4. There was nothing deficient in plaintiffs' motion requiring that they "amend" it with more detailed statements. *See* Opp'n at 10. Following the Court's determination of liability for fees, plaintiffs have requested (and the Department of Justice concurs) that the Court set a date for submissions on the value of services by the Baldus plaintiffs' counsel. *See* Pls.' Br. at 14. Plaintiffs agree that defendants should have the opportunity to review and challenge those statements for services. *See* Opp'n at 10.

III. WHILE THE DEPARTMENT'S "PROPORTIONALITY" ARGUMENTS ARE PREMATURE, THEY ARE UNPERSUASIVE IN THE CONTEXT OF THIS EXTRAORDINARY CASE.

The Department's brief tries to parse the litigation into smaller and smaller pieces in an attempt to diminish plaintiffs' accomplishment, contending: the Complaint "comprises two distinct cases," Opp'n at 7; plaintiffs "lost . . . on 8 and 2/3rds of their 9 claims," *id.*; the Baldus plaintiffs rode the Voces plaintiffs' "coattails to the ultimate Judgment" on the claim on which they prevailed, *id.* at 8; and "out of 140 districts, the Court found that only one boundary line could not be upheld," *id.* at 8. In the Department's estimation, any fee award "should account for that success ratio." *Id*. at 8. Despite the Supreme Court's explicit mandate against applying a "mathematical approach comparing the total number of issues in the case with those actually prevailed upon," *Hensley*, 461 U.S. at 435, defendants attempt to convince the Court to do precisely that.

In its anticipatory criticism of the fee statements plaintiffs have yet to submit, the Department conveniently avoids any discussion of the extraordinary lengths to which it went to attempt to defeat the plaintiffs' Voting Rights Act claims, including the remedy, raising instead its contentions that "[t]he majority of the litigation and discovery . . . [was] unsuccessful." Opp'n at 7; *see id.* at 8, 13-14. Setting aside the Department's selective memory in favor of a comprehensive review of the record, however, it is noteworthy that:

- The discovery struggles were unprecedented and so was this Court's response to them. Discovery continued even as the trial began.
- The Department of Justice brought an unsuccessful motion to dismiss the amended complaint on August 4, 2011, yet then brought no subsequent motions or in any way attempted to narrow the issues until February 10, 2012, with its summary judgment motion, just eleven days before the trial.
- Plaintiffs did withdraw some of their claims—in direct response to the Court's suggestion that the plaintiffs use the limited time remaining for trial—after the

legislature declined to address the Court's concerns with Act 43, even though the Court sacrificed two days of trial waiting for the legislature to act.

- The joint efforts by the Voces plaintiffs and the Baldus plaintiffs conserved the parties' and the Court's time and, it will be shown, saved the taxpayers money.

The Department's unsupported complaints about "massive time" wasted on withdrawn claims ignore the record. *See* Opp'n at 11. (For example, defendants identify no such "massive" efforts they made to defend against Native American population claims.) As this Court recognized in its opinion on the merits, the successful Voting Rights Act claim "consumed nearly all of the trial time," Mem. Op. at 12, and it likewise accounted for a substantial proportion of pretrial preparation. Much of discovery was devoted—however frustratingly—to learning legislative "intent," an issue this Court recognized as directly relevant to claims under the Voting Rights Act, *see* Dec. 8, 2011 Order (Dkt. 74) at 3, and which ultimately formed the backdrop of the panel's opinion on the merits.

The contention that plaintiffs could be ordered to pay defendants' fees barely warrants a response. The only case cited for this proposition, *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978), established a standard for awarding attorney's fee awards to successful defendants in Title VII cases—but found that the standard had not been met. Indeed, the Department cites not a single case in which a civil rights plaintiff—and certainly not, by the Department's own admission, a prevailing plaintiff—was ordered to pay the state's attorney's fees. Further, the time to move for attorney's fees long since has passed (never mind Rule 11); even if the Department's argument had merit, the Court could not entertain it absent a motion by the Department.

Finally, and most critically, no claim brought by plaintiffs could be characterized as unreasonable or groundless. As the Court itself acknowledged, technological advances have brought substantive and procedural changes to redistricting that courts have yet to explore. *See*

Trial Tr. at 15:10-16:10. Such advances also bring change in law: population deviations once tolerated may no longer be justifiable. That an expectation of zero deviation is now the rule is reflected in the congressional boundaries of Act 44. Even the most difficult claims brought by plaintiffs were far from groundless, particularly in light of this evolving landscape and the legislature's remarkable intransigence—in discovery and in remedying the violation of federal law.

Plaintiffs prevailed because the Court enjoined the implementation of Act 43 in its entirety. It is no longer the law. Since filing their motion, however, plaintiffs also have prevailed in the remedial phase with the Court's adoption of their proposed remedy. The state, by contrast, proposed two district plans—reflecting its approach at trial and its misguided fixation on voting age population—that failed to cure the Voting Rights Act violation the parties were asked to remedy, jointly if possible. In refusing to agree to a remedy that allowed for an "effective voting majority," as did the plaintiffs' proposal, which the Court accepted, the state simply added to plaintiffs' legal bill—and hence its own.

CONCLUSION

For the reasons set forth above, the plaintiffs respectfully request that this Court:

1. Grant the plaintiffs' motion to alter or amend the original judgment as to costs;

2. Issue an Order determining, pursuant to Fed. R. Civ. P. 54(d)(2)(C), that defendants are liable for reasonable attorney's fees and costs to the Baldus plaintiffs and the Voces plaintiffs under 42 U.S.C. § 1988(b);

3. Issue an Order granting the Voces plaintiffs' request for $187,454.22 in attorney's fees and $25,995.56 in costs; and

4. Pursuant to the plaintiffs' request—now joined by the Department of Justice—establish a schedule for the submission of the Baldus plaintiffs' itemization of legal fees and costs and for the state's response followed by the plaintiffs' reply.

Dated: May 10, 2012.

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